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A Local Board's Experience with Civil Charges and Penalties

by Edwin L. Rosenberg

When the City of Norfolk appointed a wetlands board in 1982, most other jurisdictions within the Commonwealth had already gained a full decade of experience in administering their local programs. As the person charged with developing Norfolk's wetlands program, I must admit that being late had its advantages. Considerable time was spent attending various wetlands board meetings and talking with local, VMRC, and VIMS staff. Valuable insights were gained which helped shape our program. One process stood out, however, that very few boards dealt with in a consistent and workable fashion. Namely, how to deal with violations and after-the-fact permit applications.

From the start, Norfolk's staff felt strongly that the credibility of our permit process was directly related to how unauthorized activities were handled. Clearly, if someone can break the law with impunity then permitting loses its credibility. Moreover, if a contractor can build a bulkhead absent a permit, and without penalty, then he has a distinct competitive advantage over law-abiding contractors. As discussed at the annual wetlands management symposium (in formal and informal fashion), every locality seemed to have a particularly flagrant violation or violator that tested or abused the system.

From these discussions, we understood early on that there was no simple solution to violations. But first and foremost, we realized that a carefully thought out violation procedure was mandatory if we were not to be arbitrary and capricious. Our approach was to establish a two-track process. If someone commits a violation they are brought before the Board to either be ordered to submit an after-the-fact permit application or restore the wetlands or dunes. The criteria for decision are quite simply that if the activity would have been approved based on a review of the State's policy, standards, and guidelines, and an evaluation of prior decisions by the Board in similar cases, then an after-the-fact application is ordered to be submitted. If the project or activity would not have been approved, then the fill or structure must come out and the wetlands or dunes restored within a specified time period.

Utilizing this approach for the last eight years, it's our assessment that this process works in the vast majority of cases. It doesn't work when a contractor or property owner illegally places a structure in an approvable location and than seeks to acquire an after-the-fact permit. Consequently, the competitive advantage and/or time savings is gained with no apparent means of redress by our local board other than to deny a permit. Seeking to have the structure removed would in all likelihood be futile, particularly if the project were justified, wetlands impacts were minimized, and it conformed with State standards and guidelines. The damage done would not be to the resource, but to the integrity of the program.

One approach suggested to combat this problem is to pursue the revocation of contractors' licenses if they continued to operate unlawfully. There is merit in this approach, but it may prove difficult and cumbersome to pursue in all cases and would not work where property owners were responsible for the activity.

Many have suggested that increasing the fee for after-the-fact applications might be the solution. Our opinion is that it would not. A fee high enough to deter an unscrupulous contractor or property owner would unfairly penalize others that clearly didn't know of the regulatory process.

Furthermore, one of the primary roles of local wetlands boards should be to educate and build support within the community for the protection of wetlands and sand dune resources.

Measures, such as exorbitant after-the-fact fees, that are punitive to everyone no matter what the circumstances, may do more to damage the program in the long run.

Fortunately, the General Assembly during their 1990 session provided an additional enforcement tool by allowing local wetlands boards (and VMRC) to assess civil charges and seek civil penalties in court. As specified in Section 62.1-13.18:2 of the Code of Virginia, local wetlands boards may order, with the consent of the person in violation, a one-time payment of civil charges for each violation not to exceed $10,000. Civil charges shall be in lieu of any appropriate civil penalty which could be imposed by the Circuit Court. Civil charges may also be in addition to the cost of any restoration ordered by the local board. Civil penalties may be sought in the Circuit Court in an amount not to exceed $25,000 for each day of violation.

Earlier this year, our office began developing policy guidance and procedural changes for our Board's consideration in order to implement these new provisions. Our work included a review of the guidance document, "A Review of Current Enforcement Procedures in Light of Recent Changes to Title 62.1 of the Code [sic] Virginia" provided by VMRC, consultation with our legal counsel, and a work session with our Board. The effort culminated in our Board's adoption on May 22, 1991 of revised violation procedures which included the following civil charge policy:

A **The policy of the Norfolk Wetlands Board is to consider the assessment of a civil charge for violations of the City's Wetlands and Coastal Primary Sand Dune ordinances which meet one of the following criteria:**

- As determined by the Board, the violation was knowingly or intentionally committed. Factors to consider include, but are not limited to, evidence of prior consultation or site meetings with Wetlands Board staff, testimony or evidence presented at the violation hearing, and issuance of a prior wetlands or dune permit. Failure to comply with the conditions of an authorized wetlands or dune permit shall constitute a knowing violation.
- The violator has been served notice to appear before the Wetlands Board on prior violation(s). In all cases, inclusion in this category shall constitute a knowing violation under criteria 1.
- Significant and/or irreparable damage has occurred to the wetlands or primary dunes as a result of the subject violation.

B **The policy of the Board is to determine the civil charge amount based on the degree of environmental impact and noncompliance. The civil charge matrix within VMRC staff report entitled, "A Review of Current Enforcement Procedures in Light of Recent Changes to Title 62.1 of the Code [sic] Virginia," shall also be considered in determining an appropriate civil charge amount. Environmental impacts shall be based on supporting documentation provided within the State's guidelines and/or an evaluation by the Board's technical advisor from the Virginia Institute of Marine Science.**

C **The degree of noncompliance shall be a further consideration in determining the civil charge amount. Relative degree of deviation or noncompliance refers to the extent, or magnitude, of a violation. Other factors to be considered are the**

violator's degree of good faith, willfulness, history of noncompliance, and cooperation.
The above factors and specific circumstances of the violation shall govern the establishment of an appropriate civil charge. However, in order to defray administrative costs of pursuing a civil charge, it shall be the policy of the Board not to establish a charge of less than $100.

D **In cases of unauthorized activity or permit violation, staff shall provide a recommendation on whether to assess a civil charge based on the policy criteria. In cases where a civil charge is recommended, staff will provide a recommended charge amount based on an evaluation of environmental impact, degree of noncompliance, and evaluation of the VMRC civil charge matrix (Table 1)**

The key policy is that "knowing or intentional" violations will trigger a civil charge review, as well as those where significant or irreparable harm has been done. As noted earlier, the mix of violators include those that truly know that they are circumventing the law and those that do not. Norfolk's procedure seeks to differentiate between the two with civil charges generally being pursued only in knowing and/or intentional cases. In effect, everyone is given relief from charges provided that they are a first time offender, have not had any prior contact on site with wetlands board staff, and that significant or irreparable harm has not occurred to the wetlands or dunes.

It is our assessment that this focuses the civil charge/penalty provisions on the problems identified above, i.e., repeated or knowing violations by contractors and property owners, while minimizing its use where it could effectively damage the general support for protecting these resources.

Further, the civil charge review only takes place after a decision has been made on whether to order restoration or submission of an after-the-fact permit application. Procedurally, this is an important point as we feel that the civil charge determination should have no bearing on the outcome of the violation. Without this protection, the civil charge provision could inadvertently allow someone to "buy a permit", i.e., allow a structure to remain (that should be ordered to be removed) through the assessment of a civil charge.

Our civil charge policy applies both to restoration and after-the-fact cases. The rationale for considering civil charges in restoration cases is that even with the resource restored, there may be lasting damage. As an example, disturbed wetlands are more susceptible to invasion by the less valuable common reedgrass (*Phragmites australis*). The civil charge is an appropriate mechanism to extract a penalty over and above the cost of restoring the resource.

In after-the-fact cases, the civil charge establishes a remedy for the offense of circumventing the wetlands permit process. With this remedy, after-the-fact permit fees can be maintained at the same level as regular permit fees (or increased to cover only the additional administrative expense). The civil charge provision allows for the setting of an appropriate penalty based on the environmental impact and degree of noncompliance. As applied to the prior example of contractors or property owners building first and seeking permits later, repeated offenses could trigger substantial (up to $10,000) civil charges.

Table 1. Civil Charge Determination

Environmental Impact	Minor	Moderate	Major
Significant	$5,000	$7,500	$10,000
Moderate	$1,500	$3,000	$ 4,500
Minimal	$ 500	$1,000	$ 1,500

Relative Degree of Deviation or Non-Compliance

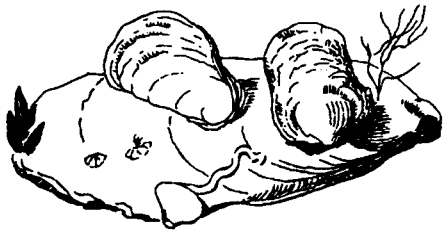
Under our revised violation procedures, the Wetlands Board considered six violations during June and July of this year. Restoration was ordered in five of the cases, with a compliance order issued for one permit violation. Civil charges were considered, based on the policy criteria, in two of the cases (an additional case was deferred until the August hearing). In both cases, a $250 charge was assessed (and agreed to). One case involved unauthorized grading activities within a coastal primary sand dune while the other pertained to a dune permit violation. The same property owner was involved in both of the violations.

In summary, with only limited experience we are finding that the civil charge and penalties provisions appear to be effective tools to help address the problem of violations. However, if used incorrectly, these same provisions could damage the violation process by making it easier to approve unjustified projects.

In our opinion, the key element is to separate the permit decision-making process from the consideration of civil charges.

Every local wetlands board, however, should be prepared for longer public hearings and more frequent use of closed sessions to consider legal ramifications. But even with these disadvantages, our opinion is that the assessment of civil charges will have a positive impact on resolving flagrant violations of Norfolk's wetlands and sand dune ordinances. ✤

Mr. Edwin L. Rosenberg is manager of Norfolk's Environmental Affairs Division which provides staff services to the Norfolk Wetlands Board.



DREDGE SPOIL OYSTERS

by Walter I. Priest, III

Normally dredging is considered to be very deleterious to oysters. The siltation from the resuspended sediments can smother oysters, particularly small recently settled spat. High concentrations of suspended solids from dredging operations can also hinder larval development and stress oysters by clogging gills, making feeding and respiration difficult.

Various local, state and federal agencies have implemented programs to minimize these impacts and protect oyster communities by regulating how, where and when the dredging is performed. There are also several state and federal management programs which seek to protect and enhance oyster resources in other ways. The State of Virginia has for years pursued a program of oyster management and replenishment to help maintain oyster stocks. In addition, the Corps of Engineers has recently embarked on a program emphasizing the beneficial uses of dredged material that is designed to use dredged material in a positive manner to help enhance and restore fishery resources.

Despite these concerns and in light of the available management programs

dredging does not have to be the perennial scourge of oysters; it can, in fact, be beneficial.

This is particularly true on the Seaside of the Eastern Shore where the lack of suitable intertidal habitat limits the area of productive oyster rock. The intertidal areas appear to offer the oysters a competitive advantage by reducing predation pressures and enhancing growth rates. In the case of overboard dredged material placement, sand and shell accumulate on the bottom at the end of the dredge pipe and replace the soft bottom community with coarse grained material. These dredged material placement areas are gradually raised in elevation over a number of dredging cycles to an intertidal level where the combination of the hard bottom and elevation make shellfish culture possible. A few of these areas have been colonized by natural oyster spawn and later used by commercial watermen for oyster harvest.

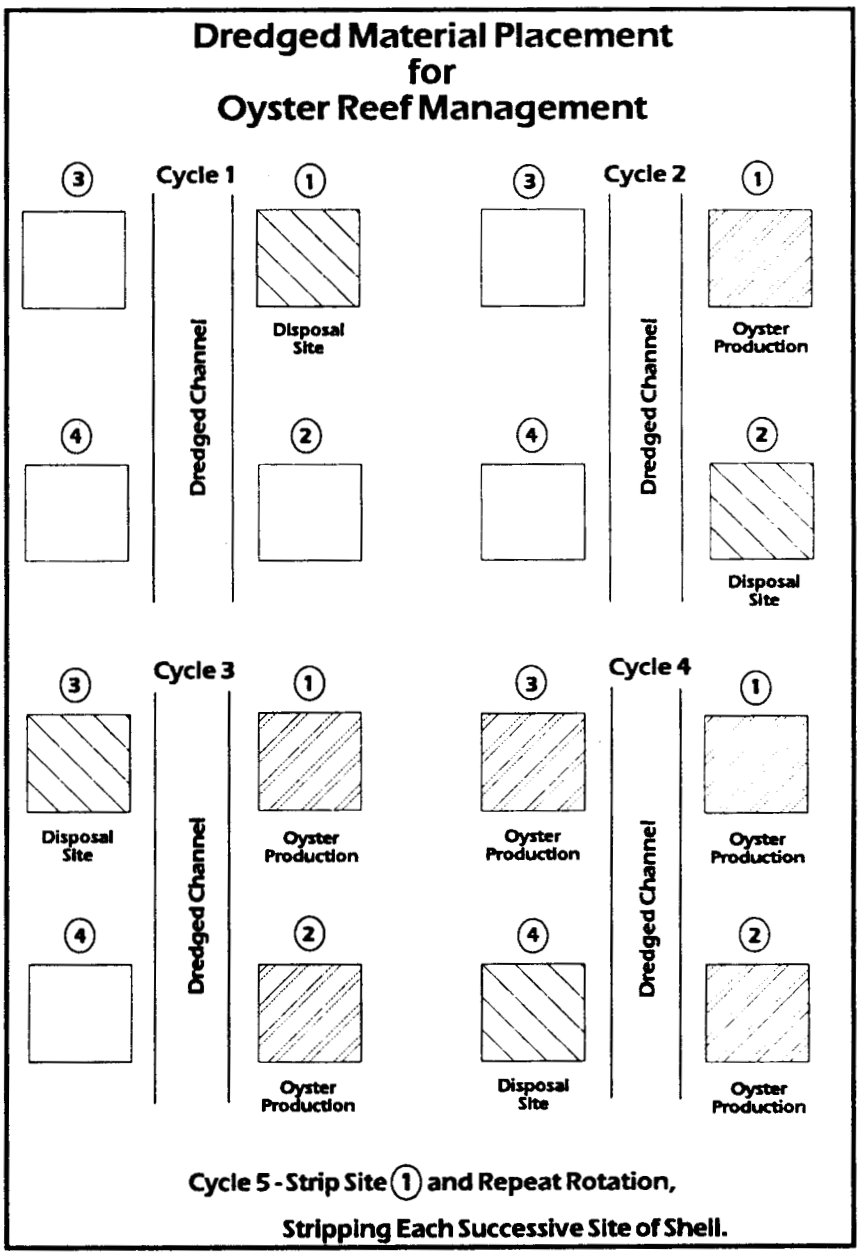
Many of these placement areas are located in unproductive portions of the Baylor Survey public oyster ground while others are located in unleased state-owned bottom. In fact, several of these leasable areas have been leased once the appropriate elevation has been reached due to dredged material placement. This can create problems because it effectively makes these areas unavailable for use during subsequent dredging episodes. If this process is followed to its logical conclusion there soon would be no usable placement areas within reasonable pumping distance of the channel because all would be leased as oyster habitat. Without a long-term plan for the placement of the dredged material, the viability of a particular project channel can be seriously imperiled.

Any plan to manage dredged material placement will require the cooperation of federal, state and local governments.

The State of Virginia through the Marine Resources Commission regulates the use of state-owned subaqueous bottom including the Baylor Survey grounds. The dredging required for maintaining navigation is managed by the U.S. Army Corps of Engineers which generally requires a fifty year placement site supplied or guaranteed by the benefiting locality.

Several times in the last ten years new sites for the placement of dredged material on the Seaside of the Eastern Shore have had to be selected because the previously used area had become productive oyster ground. Recently, a dredged material placement area on unleased state bottom was leased removing it from further consideration as a placement area. Conceivably, there could be a number of other such sites lacking only a small quantity of material to make them intertidal and thus potentially productive. The time is rapidly approaching when a plan is going to have to be formalized among federal, state and local authorities to ensure maintenance of a viable area for the placement of dredged material over the life of the project.

One way this could be accomplished would be a management plan that designated several placement sites adjacent to the project channel that together would accommodate the material from fifty years of dredging (Fig. 1). Each site would be used in rotation



for successive dredging cycles. After being utilized to its design capacity (brought up to an intertidal elevation) each site would be left alone to develop as an oyster resource until needed in the normal rotation.

When the initially developed site is again needed for placement, it could be stripped of all oyster resources including exposed shell for transplanting to unaffected public or private ground. At this juncture there would be several other areas developed adjacent to the channel, hopefully in some stage of oyster production, to offset the loss of the initial site. Alternatively, the new material could be placed in close proximity to a previously developed rock after removing the living oysters in an effort to increase the productive area.

In order for this plan to succeed over the long term, several management policies need to be adopted.

- The first would be to set aside the designated placement areas to prevent them from being leased by private individuals.
- Secondly, pre- and post-placement surveys of both physical and biological parameters should be required to monitor the effectiveness of the plan. This would provide information that would allow future modifications to enhance desirable effects and reduce any unforeseen, undesirable impacts.
- Lastly, a program that would plant shell on areas of sufficient elevation would greatly improve the potential for oyster production.

Given the continued maintenance of navigation channels on the Seaside of the Eastern Shore, the adoption of a management plan of this type would provide an opportunity to derive substantial benefits in the form of increased oyster production from the maintenance dredging activities.✤

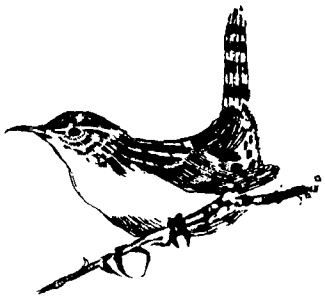
The Living Marsh

Featuring plants and animals inhabiting or visiting the marsh ecosystem.

March Wren

(Cistothorus palustris)

Julie G. Bradshaw



One of the most common but elusive residents of larger marshes in Virginia's coastal plain is the marsh wren (formerly known as the long-billed marsh wren). It resides in many types of marshes, including cattails, black needlerush, and saltmarsh cordgrass. Marsh wrens are in the same family as the Carolina wren, familiar to many who live in wooded residential areas. They are slightly smaller than Carolina wrens (about 5 inches long), have a straighter bill, and are brown with a black triangle on the upper back which is streaked with white. Marsh wrens are migratory, but may be found all year round in Virginia.

One of the most noteworthy aspects of the marsh wren's lifestyle is the male's courtship and territorial behavior. A male marsh wren's territory is about a quarter of an acre in size, and the species is abundant in larger marshes where several males can set up territories. The male's song is a "series of loud, rapid, reedy notes and liquid rattles,"[1] and they have a display flight in which they fly up 5 to 15 feet, then flutter, singing, back down into the marsh vegetation. A visitor to the marsh is easily frustrated when trying to get a good look at these birds. The species is uncanny in its ability to be so exuberant in its song and display, and yet remain so secretive and elusive to would-be observers.

During courtship, the male marsh wren may build several nests in its territory. The female later either finishes one of the male's nests by lining the inside, or builds a new nest. The nests are approximately softball-sized and are made by lashing together several plants as a foundation, then weaving in grasses to make a shell. The opening to the nest is a small hole on the side of the nest. Three to eight eggs are laid during the period from late April through

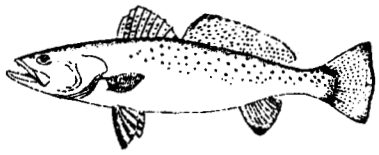
June. The female incubates the eggs for approximately 2 weeks, and the young leave the nest in another 2 weeks. The female may nest again in the same season.

[1] *National Geographic Society. 1983. A Field Guide to the Birds of North America.*

Spotted Seatrout

(Cynoscion nebulosus)

Lyle M. Varnell



Spotted seatrout, also commonly referred to as speckled trout, is an important target of recreational fishermen but has limited commercial importance in the Chesapeake Bay region. They are members of the family Sciaenidae, which includes black drum, red drum, Atlantic croaker, spot and grey trout. Sometimes confused with the grey trout, spotted seatrout are distinguished by the many large black spots on their upper side, caudal fin and second dorsal fin. Spotted seatrout may live for up to 15 years and may reach a maximum size of three feet long and over 15 pounds.

Although uncommon north of the Chesapeake Bay, spotted seatrout range from Cape Cod, Massachusetts to the Gulf of Campeche, Mexico. They are most common south of Cape Hatteras, North Carolina and within the Gulf of Mexico.

In most years, spotted seatrout begin spring migrations into the Chesapeake Bay in May. They spawn in estuarine and near-shore coastal waters, favoring deeper channels immediately adjacent to vegetated shallows. Spawning occurs during the spring and summer throughout its range. In the Chesapeake Bay spawning peaks occur from mid-May to mid-June and again in July. Within its optimum spawning temperature range of 70 - 80 degrees Fahrenheit, each female may produce from 14,000 to 16,000,000 eggs.

During summer and fall, young-of-the-year spotted seatrout seek shelter in near-shore beds of submerged aquatic vegetation (SAV). Maturing subadults and adults prefer shallow waters over SAV beds, but are also commonly found in shallow sandy bottom or shell reef areas. During mid-summer, adults may move to deeper channels and holes adjacent to SAV beds. Subadults and adults can survive in salinities ranging from freshwater tidal reaches to 77 parts per thousand (ppt). However, they favor waters which are from five to 35 ppt. Migrations out of the Chesapeake Bay and to waters primarily south of Cape Hatteras occurs during October and November.

Like other drum family members, spotted seatrout are primarily bottom feeders. They prefer to forage along channel breaks and within SAV beds. Included in their diet is detritus, benthic worms, clams, mussels and blue crabs. Soft shell blue crabs, which also exploit SAV beds, are the preferred prey of spotted seatrout.

The success of the spotted seatrout population is largely dependent upon suitable and readily available habitat. Whether it is used as a forage and feeding area or as shelter from predators, each life history stage of the spotted seatrout relies on SAV beds. The decline of SAV beds in the Chesapeake Bay is believed to be a primary cause of significant variations in yearly population levels within the bay.

Marsh Hibiscus, Rose Mallow, Swamp Cotton

Hibiscus moscheutos L.

For additional information see Technical Report Wetland Flora No. 91-9 by Gene Silberhorn

WETLANDS RECIPES

Greenbriers, Catbriers (smilax spp.).

This common green-stemmed, thorny vine can be found climbing by tendrils in most forested wetlands. The young shoots are excellent cooked like asparagus and served with butter. The young shoots, leaves and tendrils can also be prepared like spinach or added fresh to salads. Like asparagus, the young shoots are also quite good eaten raw.

This Issues Quotes

"In the beginning, wetlands were considered valueless. Only when most of the native waterfowl vanished was it determined that wetlands might ensure the survival of many endangered plants and animals. Only after billions of dollars were spent on structural flood control that resulted in further flooding were wetlands recognized for reducing flood peaks. Only after additional billions were spent to purify streams was it realized wetlands naturally filter pollutants for free." (Illinois Institute of Natural Resources, 1982)

"You would think a country that can build a smart bomb should be able to design a sewage system that works." (Robert Kennedy, Jr., 1991)

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In this issue....

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